University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at 236 Chestnut Street, Philadelphia, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 62 JUNE, 1914. NUMBER 8

THE PRESUMPTION OF SURVIVORSHIP.

The writer disclaims any responsibility for his topic. It was chosen for him and has presented as great difficulties in writing an article, as would be in the way of a lecturer speaking on snakes in Ireland. Tradition credits Saint Patrick with destroying or driving out the snakes so that there are none in the Green Isle. In the same fashion judges, English and American, have destroyed the idea of a presumption of survivorship, in our jurisprudence. In doing this they have run counter to the views of continental jurists, and in some cases our own jurists while enforcing the so-called common law rule have yearned for the flexibility or at least the certainty of the civil law.

A presumption in the old sense of the word is merely a logical inference, usually from circumstantial evidence, or it may be regarded as a fixed rule of law.

Presumptions may be classified as *prima facie,* conclusive and spurious. Absence for seven years with a total lack of communication with those with whom the absent person would naturally have communicated if alive, is *prima facie* evidence of the death of the one so absent. The presumption of the immemorial existence and legal origin of a custom, right or easement enjoyed during living memory is an example of a conclusive presumption. A spurious presumption says McKelvey [1] is one which has

[1] §38.

nothing to do with evidence and among spurious presumptions he places the so-called presumption of survivorship.

Where the facts as to the death of a person are fixed and certain, there is no room for any presumption. It is only in those cases in which there is a doubt or dispute as to the facts that a presumption can be applied in any event.

The question of survivorship is one which can only arise in connection with the devolution or descent of property, real or personal, and only in those cases where its course would be changed by the fact that one person outlived another. It is usually in connection with some such event as the sinking of the Titanic or a Conemaugh flood that the question most clearly arises. The terms "common disaster," "same accident," "common calamity," "same catastrophe," and similar terms are used to indicate the event which has ended the lives of two or more persons and made it necessary to determine which if any survived. The terms are broad enough to include anything from death in battle or by murder, to death in flood, fire or shipwreck. When as is often the case, the ownership of a vast fortune turns on the solution of the problem it is at least interesting to speculate as to the crucial fact, but the way in which it will be resolved will depend on the jurisdiction in which, and the code by which it is to be adjudged.

"By the Roman law if a father and son perished in the same shipwreck or battle and the son was under the age of puberty it was presumed that he died first but if above that age, that he was the survivor, upon the principle that, in the former case, the elder is generally the more robust, and in the latter the younger." [2]

The civilians taking the Roman law as a basis, built up a set of arbitrary rules or presumptions of fact as to survivorship in common disaster which "are more apt to hit the truth than others, because they are based on attributes of age and sex which fix the average strength of individuals, and their ability to prolong their lives in shipwrecks or other disasters in which strength may be useful to live." [3]

[2] Cowman v. Rogers, 73 Md. 403, 21 Atl. Rep. 64 (1891).
[3] Supreme Council v. Kacer, 96 Mo. App. 93; 69 S. W. Rep. 671 (1902).

These arbitrary rules were by the civilians put in the form of five or more proposals or rules for the guidance of the courts: [4]

1. To admit a presumption derived from the difference either of sex or age or bodily strength or from propinquity to the place in which the cause of death arose.
2. To admit in all cases the presumption founded on order of nature elder before younger.
3. To admit the latter only where the deceased were of same sex, age or were of age of puberty.
4. Not to admit any presumption when the right of him to succeed depended on predecease of one in whom estate vested and survivorship of him on whom devolved and through whom it was claimed.
5. Presume both died at same time and admit heirs of both to share in property.

As illustrations of the way in which the civilians decided these cases, we find that in 1572 the Parliament of Paris dealing with survivorship in the Massacre of St. Bartholomew, decided that parents would be slain before their children because the slayers would regard them as the more dangerous.[5]

In 1629 a mother and her daughter, aged four years, were drowned in the Loire, the Parliament of Paris held that it would be presumed that a child of such tender years died first.

In 1658 a father and son were slain in the battle of the Dunes and on the same day the daughter became a nun and therefore civilly dead at the same hour the battle began. The court held that the son should be decided to have survived.[6]

Again a father and two sons, one over and the other under the age of puberty, lost their lives in a common disaster, the civil law relying on its arbitrary rules held that they died in the following order—(1) the son under the age of puberty (2) the father (3) the son over the age of puberty.

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[4] 4 Burge Comm. on Colonial and Foreign Laws, 11.

[5] Stryk. Diss. 10 C. 6, n. 11.

[6] Fodere, Vol. 2, 220.

In another case where a mother and son were hanged at the same time, on the same gallows, the son was presumed to have survived because of difference in age and sex.[7]

These illustrations prove that the civilians did consider age, sex, average strength, ability to prolong one's life in disaster and even in cases of homicide the mental operations of the slayers.

When Napoleon I promulgated that remarkable code which bears his name, in whose preparation he took a very considerable part, and for which he is entitled to much greater credit than is commonly given him, there was written into it three articles which have settled the law of survivorship for all time in all countries in which the civil law or the Napoleonic Code is the recognized standard. The articles from the Code Napoleon are as follows:

> If several persons respectively called to the succession of each other, perish by one and the same accident, so that it is not possible to ascertain which of them died first, the presumption of survivorship is determined by the circumstances of the event and in defect of such by force of age and sex.[8]
>
> If those who perished together were under fifteen years the eldest shall be presumed to have survived. If they were all above sixty the youngest shall be presumed to have survived. If some were under fifteen years and others more than sixty, the former shall be presumed to have survived.[9]
>
> If those who perished together were of the age of fifteen years complete but less than sixty the male is always presumed to have survived where there is equality of age or if the difference does not exceed one year. If they were of the same sex the presumption of survivorship which gives rise to succession according to the order of nature must be admitted; thus the younger is presumed to have survived the elder.[10]

In the United States, two States, California and Louisiana, are controlled in their law by the civil law if not by the Code Napoleon itself. In California the subject is governed by Section 1963 of the Code of Civil Procedure and in the Louisiana Code it is regulated by Sections 936-939. In substance these

[7] Strauch, Diss. 11th 24.
[8] Article 720.
[9] Article 721.
[10] Article 722.

codes adopt the principles of the Code Napoleon as to survivorship.

We can illustrate the working of these codes by reviewing two cases very briefly. In *Hollister* v. *Cordero,*[11] the husband and wife were murdered and their house in which their bodies were left, was set on fire and burned. There was no proof as to which died first. Both were over fifteen and under sixty years of age and the Court applying the Code of Civil Procedure, Section 1963, presumed that the male survived and added that murder perpetrated thus was as much a calamity within the code as shipwreck or battle. It would seem that in such a case it might be presumed with equal probability that the murderer would first slay the male, the more formidable antagonist of the two, just as the French courts held concerning the Massacre of St. Bartholomew, when they decided that it would be presumed that the parents would be slain before minor children because they were more dangerous to the slayers.

The other case [12] shows the rule as applied in Louisiana. On July 4, 1889, the French steamer La Bourgougne was sunk in midocean in a collision. Among the passengers were a Mrs. Langles aged fifty-two, and her daughter aged thirty-five, who could swim, while her mother could not. Neither was seen to leave their state-room and there was no facts or circumstances on which to determine which survived. Applying the presumptions established by the code the Louisiana courts held that Miss Langles survived her mother.

The common law of England has always refused to indulge in any such guessing as to survivorship and has enforced the well known rule "He who affirms must prove." The wisdom of this policy "has been unduly vaunted," says Mr. Justice Goode, in *Supreme Council* v. *Kacer,*[13] and he suggests that one sometimes feels the need of the repudiated presumptions of the civilians. The Scotch law, like the English, avoids the "subtle presumptions of fact which adorn modern codes in imitation of

[11] 76 Cal. 649, 18 Pac. Rep. 855 (1888).

[12] *In re* Succession of Langles, 105 La. 39, 29 So. Rep. 739 (1900).

[13] *Supra,* note 3.

the Roman system," and if satisfactory evidence of survivance cannot be obtained, neither or no one of the parties is held to have outlived the others.[14]

Before taking up a discussion of the law of England and United States upon this subject, it will be of interest to note the rule of law on the subject as we find it established in other countries. By the Mohammedan law of India, when relations perish together in a common calamity, it is presumed that they all died at the same moment of time. The ancient law of Denmark was to the same effect. In Holland, Prussia and Austria the presumption is that those who die in a common disaster die together and no one receives or transmits succession. Italy and Spain have followed the same principles established by the French code.

The principle of the English law that "he who affirms must prove" is the foundation of the decisions made in England and the United States. The principle was very clearly stated by the Lord Chancellor in the case of *Underwood* v. *Wing*,[15] when he said:

> "We may guess or imagine or fancy, but the law of England requires evidence."

All through the English decisions from the earliest times this principle has run, like the purple thread in the bank note, and is the characteristic of all our English and American decisions.

An examination of some of the cases will throw light on the situation. Let us first consider the English cases.

One of the earliest is *Broughton* v. *Randall*,[16] decided at Trinity Term in the thirty-eighth year of Queen Elizabeth's reign. The question of survivorship arose in a contest over a widow's dower and in the marginal note, the principle is stated, that the wife of the longest liver of two joint tenants shall be endowed. The facts were briefly that father and son held as "joint tenants to them and the heirs of the son." They were both hanged on one cart, but because the son as was deposed by witnesses survived as appeared by some tokens, *viz.*—his shak-

[14] Erskine's Principles, 467.
[15] 4 DeGex M. & G. 633 (1854).
[16] Croke Eliz. 502.

ing his legs, his feme thereupon demanded dower and upon this issue nunques seisie dower, this matter was found for the demandant.

In the case of *General Stanwix,*[17] General Stanwix with his wife and daughter were lost at sea. No evidence was produced of the circumstances attending the loss of the vessel. The case was compromised at the recommendation of Lord Mansfield, who said that,

"there was no legal principle upon which he could decide it."

In *Mason* v. *Mason,*[18] the testator and his son were lost while on board ship on a voyage from India to England. All on board perished. The Master of the Rolls held that the rules of the civil law had never been in force in England and he could not see how any presumption could be raised as to survivorship as between father and son.

In *Taylor* v. *Diplock,*[19] husband and wife were lost in a shipwreck. The court held that as there was no satisfactory evidence as to survivorship, nor any circumstances shown of a decisive character as to the ability of the persons to sustain the peril to which they were subjected, it must be assumed that they perished at the same moment.

In *Sillock* v. *Booth,*[20] the court held that where there was no special circumstance in evidence from which it might be inferred that one of two persons dying in the same accident survived the other, the law would draw a presumption from general circumstances, such as the comparative health, strength, age and experience of the parties. This case, however, it is fair to say, has since been subject to criticism and as will be seen by a review of the later cases, is not now to be regarded as of the highest authority.

In *Selwyn's Goods,*[21] where husband and wife were lost at sea and no circumstances of the disaster were known, showing any advantage on the part of either, the court said that in the

[17] 2 Wm. Black 640 (1767).
[18] 1 Meriv. 308 (1816).
[19] 2 Phillim. 261 (1815).
[20] 1 Younge v. Collyer Ch. 121 (1842).

absence of "clear evidence" it has generally been taken that both died at the same moment.

In *Doe* v. *Nepean*,[22] the court held that the fact that one was alive at a given date must be proved by the person alleging the fact, adding that while there might arise a presumption of death from an absence of seven years without being heard from, there did not arise any presumption as to the date of the death. It may be said that this case applies rather to the presumption of death than to the presumption of survivorship. The two presumptions are very closely related and the same principle runs through both that the burden is on him who alleges the fact of life at a given time, to establish it by competent evidence.

In *Underwood* v. *Wing*,[23] a husband, wife and three children sailed from England for Australia. The ship was lost off Beachy Head. The husband, wife and two sons were washed into the sea by the same wave. The daughter perished later. Sir John Romilly, the Master of the Rolls, held, citing *Mason* v. *Mason*, *Taylor* v. *Diplock*, and other cases, that there was no presumption of survivorship as between husband and wife.[24]

One of the most interesting cases in the English reports upon this subject is *Ommaney* v. *Stilwell*.[25] Edward Couch, the Mate of the ship Erebus, sailed in 1845 on the ill fated expedition of Sir John Franklin to the North Pole. He was known to be living on June 30, 1845. His father died in January, 1850. The will of Edward Couch, who was never heard from after June 30, 1845, left his estate to his father, and the question before the court upon the distribution of his property was whether Edward Couch survived his father. The court took testimony to ascertain the facts and among other things received the statement of Dr. Rae who searched for Franklin's party. Dr. Rae told of interviewing Eskimos who said that they had seen a party of

[22] 3 Hagg. Eccl. 748 (1832).
[23] 5 B. & Ad. 86 (1833).
[24] 19 Beavan, 459 (1854).
[24] This case was referred to in Wing v. Angrave, 8 H. L. C. 182 (1860), and the doctrine there laid down was followed. In this case the House of Lords added the statement of the rule that the burden of proof is on the one asserting the survivorship.
[25] 23 Beavan, 328 (1856).

forty whites crossing the ice in 1850 at a time when wild fowl were about. It appeared that subsequently the bodies of a number of Franklin's party were discovered frozen to death, and about them on the ice were the feathers and bones of wild fowl which had been shot and killed. The body of Couch was not among those found. From the fact that Couch's body was not with those found it could be fairly argued with some certainty that he had been lost prior to their death. Sir John Romilly, the Master of the Rolls, said:

> "I confess I cannot come to any satisfactory conclusion on the subject. My Chief Clerk is of opinion that the son survived the father, and has made or was about to make a certificate accordingly. He relied on the youth and strength of the son. I cannot see that this conclusion is erroneous. I cannot but express my extreme inability to come to a satisfactory conclusion, but relying on the chances in favor of the youth and strength of the son, I see no reason to differ from the conclusion of the Chief Clerk."

An order was entered accordingly. It is submitted that this decision, particularly in view of the fact that the body of Couch was not among those discovered by Dr. Rae, is absolutely unsupported by such evidence as is required under the general principle of the English law. It is just such a decision as would be reached by applying the civil law rule, and is a good illustration of how far one may go in guessing at facts where there is in reality little or no evidence to support a conclusion.

In *The Goods of Johnson*,[26] a question arose as to the presumption of survivorship as between two persons on a vessel which sailed from New York for San Francisco February 1, 1896. The vessel was never heard from and was supposedly lost off Falkland Islands. Upon an application for administration, the English courts gave leave to the petitioner to swear "that there is no reason to presume that one died before the other."

From these cases we think it may be safely concluded and stated as the rule of law in England, that where two or more persons perish in a common calamity, survivorship as between

[26] 78 L. T. N. S. 85 (1897).

them can only be determined by such clear evidence as will enable a jury to determine with reasonable certainty, though not with absolute certainty, that one or the other survived.

In our American courts there are numerous cases in which the presumption of survivorship has been considered. In some of the cases the courts have reached their conclusions by considering facts or circumstances which were of so little moment as to almost make the result a guess. The general result, however, of all the decisions is the same as in the English courts, *viz.*—that he who affirms survivorship must prove the fact, and in the absence of such proof or in the absence of facts from which a jury may with moral conviction find survivorship, the parties will be presumed to have died at the same time. The cases are too numerous and the decisions too long to warrant an elaborate review or many quotations therefrom.

In *Coye* v. *Leach*,[27] one Keith, his daughter, Caroline E. Coye, her husband and their only child were on the Pulaski, sailing from Charleston to Baltimore. The Pulaski was lost June 4, 1838, with all on board. The court said:

> "These are clearly arbitrary rules, as, in the nature of things, a week or day less than the respective ages named would not usually, in any degree, affect the ability of the party to sustain and prolong life in case of exposure by shipwreck. Such rules being thus arbitrary in their character, to some extent, would seem to require a legislative sanction; and it may be expedient and proper to provide, by a legislative act, for cases of this character and description. But, without such legislation, we do not feel authorized to adopt any fixed period of age, as decisive of the question of survivorship of those who perish in a common disaster, and where no facts or circumstances are known, that would aid in deciding the point of survivorship. To a certain extent we might well go, in applying the principle as to disparity of age. Thus it would be proper and reasonable to hold that one of middle age, and in the full vigor of life, would ordinarily survive a mere infant, or child of very tender years; and the same would be alike true as to such person and the man well stricken in years.
>
> "We therefore should probably have no difficulty in the present case, in disposing of the question of the survivorship of Caroline K. Coye, the granddaughter of Mr. Keith. Her age and strength were less adapted to sustain her, in the continuance of the struggle for life, under this peril, than those of

her mother or her grandfather, and might be so held without resort to any arbitrary rule as to a precise point of time in the age of the parties. But when we approach the case of Caroline E. Coye, and are asked to find that she survived her father, Mr. Keith, we find, on the one hand, the age of Mrs. Coye to have been somewhat more favorable to her survivorship, though far less decisive than in comparison of her case with that of her infant daughter. But we have the opposing circumstance, that she was of the weaker sex; and thus one presumption operates to neutralize the other, and the known facts fail to present a case of controlling presumption in favor of either. The case stated, then, stands thus: Sylvanus Keith and his daughter, Mrs. Coye, perished in the same disaster. No fact is shown giving the least indication that either party, from the nature of the accident or the position of the parties, had any advantage over the other for protracting life. Nothing is shown of their peculiar capabilities arising from personal strength or vigor. Nothing indeed is put into the case, to control it in favor of either, besides age and sex; and these, as already remarked, are not decisive tests in the present case. In truth, there is nothing in the case to show that either the father or the daughter survived the other. The evidence in the case, upon the facts stated by the parties, fails to show that the estate of Sylvanus Keith ever vested in Caroline E. Coye, his daughter. To effect this, it was necessary that she should have survived her father. We do not feel authorized to say that this fact is satisfactorily established. For aught that appears in the present aspect of the case, they may both have perished together. This being so, and no arbitrary presumption being authorized by law in such cases, arising from age or sex, the consequence is, that those who seek to enforce their rights as heirs at law of Caroline E. Coye, must fail in establishing their right to a distributive share in the estate of Sylvanus Keith. As to the granddaughter, Caroline K. Coye, the evidence of her survivorship is inferior to that of her mother, and no claim can be sustained through her."

In *Moehring* v. *Mitchell,*[28] Chancellor Kent held that where a mother and daughter died in the same disaster and there was no evidence of survivorship, no presumption could be drawn.

In *Smith* v. *Croom,*[29] the question of survivorship was considered at some length. The case is an exceedingly long one, but the bulk both of the statement of the facts and of the opinion is

[27] 8 Metc. 371 (Mass. 1844).
[28] 1 Barbour Ch. 264 (N. Y. 1846).
[29] 7 Florida, 81 (1857).

taken up with the question of domicile. Upon the question of survivorship it appeared that Croom was a consumptive who had been living in Florida for his health. He, with his wife, two daughters and one son sailed on a vessel which was lost. It appeared by the proofs that Croom, his wife, and his younger daughter was swept overboard at the same time; that his other daughter and one son survived him and that the son survived the daughter. The case is chiefly of value in that it decides that if a common calamity to which the parties are subject, consists of a succession of events, separated from each other in point of time and character, which events are likely to produce death, the degree of exposure to danger or the difference in age, sex, and physical strength, becomes a matter of evidence for the consideration of a jury. The case is also of value in establishing the principle that the evidence in such cases need only produce moral conviction, and need not go so far as to exclude the possibility that the event was otherwise.

One of the leading cases upon the subject in this country is that of *Newell* v. *Nichols*,[80] growing out of the loss of the steamer Schiller on May 7, 1875, near the English coast. The testatrix whose will was under consideration had died in 1870 leaving to survive her, her mother, her husband and two minor children. The mother, husband and children were passengers on the Schiller. The mother was aged sixty-nine, the husband forty-five, the daughter ten, and the son seven. There was no evidence of survivorship as among the four parties. Mr. Chief Justice Church, discussing the question, said:

> "It is not claimed that there is any legal presumption that the children died at the same time. Indeed it may be conceded that it is unlikely that they ceased to breathe at precisely the same instant and as a physical fact it may perhaps be inferred that they did not, but this does not come up to the standard of proof. The rule is that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities either that there was a survivor or who it was. In this respect the common law differs from the civil law. Under the latter certain rules prevail in respect to age, sex and physical condition by which survivorship may be determined,

[80] 75 N. Y. 78 (1878).

but nothing can be more uncertain or unsatisfactory than this conjectural mode of arriving at a fact which from its nature must remain uncertain, and often upon the existence of which the title to large amounts of property depend. In the language of the Lord Chancellor in *Wing* v. *Underwood*,[31] 'We may guess or imagine or fancy but the law of England requires evidence.' There are cases where a strong probability in theory at least would arise that one person survived another, and perhaps as strong as that that there was a survivor, and yet the common law wisely refrains from acting upon it in either case. It is regarded as a question of fact to be proved, and evidence merely that two persons perished by such a disaster is not deemed sufficient. If there are other circumstances shown tending to prove survivorship, the courts will then look at the whole case for the purpose of determining the question, but if only the fact of death by a common disaster appears, they will not undertake to solve it on account of the nature of the question and its inherent uncertainty. It is not impossible for two persons to die at the same time, and when exposed to the same peril under like circumstances it is not as question of probability very unlikely to happen. At most the difference can only be a few brief seconds. The scene passes at once beyond the vision of human penetration and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first, especially when the transmission of property depends upon it, and hence in the absence of other evidence the fact is assumed to be unascertainable and property rights are disposed of as if death occurred at the same time. This is done, not because the fact is proved or that there is any presumption to that effect, but because there is no evidence and no presumption to the contrary. . . . All the common law authorities are substantially the same way and the rule which I think is wise and safe should be regarded as settled."[32]

The courts of Kansas have adopted and followed the doctrine of *Newell* v. *Nichols*, in the case of *Russell* v. *Hallett*.[33] In that case an entire family were drowned while crossing a river. The only evidence was that of a witness who heard the mother

[31] *Supra*, note 15.

[32] There was a decision as to the same effect in Kansas Pacific Railway Co. v. Miller, 2 Col. 442 (1874), in which case a train wreck was caused by the destruction of a bridge on the line of the railway. In Stinde v. Redfern, 3 Redfields Surg. Reports, 87 (N. Y. 1877), another case growing out of the loss of the Schiller, the Surrogate held that there was no presumption of survivorship.

[33] 23 Kansas, 276 (1880).

call, but reached her too late. He could not say that the other members of the family had not also called for help, nor could he say that they had been lost at the time he first heard her. The court refused to find that the jury erred in deciding that all the parties perished at once.

In *Fuller* v. *Linzee,*[34] Fuller, who was aged thirty-eight and accustomed to the sea and to boating, together with his wife, aged thirty-two and in feeble health, sailed from Calcutta to New York in 1876. The vessel was last seen where it was likely that it encountered a cyclone. An insurance policy on Fuller's life provided that "in case the said assured should die before the decease of her husband" the amount of the insurance should be payable to their children. The court refused to consider whether there was any presumption to be drawn from the fact of the feeble health of the wife and ruled that she had no interest which was transmissible, unless she survived, and that her claim could not be maintained without proof that she had so survived.

In *Johnson* v. *Merrihew,*[35] the court pointed out that the reason that all persons who are lost in a common disaster are supposed to have perished at the same moment of time, is not so much because the fact is presumed by the law to be true, as because there is an entire absence of proof to the contrary. The court said:

> "Death may be proved by showing facts from which a reasonable inference would lead to that conclusion; as by proving that a person sailed in a particular vessel for a particular voyage, and that neither vessel nor any person on board had been heard of for a length of time sufficient for information to be received from that part of the globe where the vessel might be driven, or the persons on board of her might be carried. *White* v. *Mann.*[36] If death may be inferred from the facts shown, it logically follows that the time of the death may be fixed, with more or less certainty, in the same manner. *Watson* v. *King.*[37] In the case at bar the vessel commanded by Aaron W. Nickerson, heavily laden with coal, sailed from Troon, in the south of Scotland, for Havana—voyage usually

[34] 135 Mass. 468 (1883).
[35] 80 Me. 111 (1888).
[36] 26 Me. 361 (1846).
[37] 1 Starkie Rep. 121 (1815) Eng.

accomplished in from twenty-five to forty days—in the track of many sailing vessels and steamers plying between the north of Europe and America. In the case of shipwreck, it is improbable, if not impossible, that the Benjamin Hazeltine, if driven ashore, should not have been reported in the United States within six months of her loss. If any on board of her had been rescued by passing vessels, they would have within that time sent the intelligence of shipwreck to the home port of the vessel. The circumstances surrounding the vessel, and the voyage that she entered upon, may well authorize the inference of her loss, with all on board, within the six months following the date of her departure from Scotland, and a jury would be authorized to find the death of her master and his family prior to September 11, 1880. The weight of authority at the present day seems to have established the doctrine that, where several lives are lost in the same disaster, there is no presumption from age or sex that either survived the other; nor is it presumed that all died at the same moment; but the fact of survivorship, like every other fact must be proved by the party asserting it."

In *Re Ehle's Will*,[38] Ehle, his son and three grandchildren were in a house, which was destroyed by fire. All were burned to death. One person not related to them, escaped from the house. From his evidence it appeared that the fire began in one end of the house where Ehle had his room. From the peculiar circumstances of the case the court held that Ehle died first; that the fee to the real estate vested in the grandchildren, subject only to the life estate of their father; that there was no evidence to show the survivorship of John Ehle and his life estate was extinguished and that the whole real estate went to the next of kin of the children. As to the personal property the court held that the burden was upon the person claiming survivorship to prove the fact, and that the fact not being proved as among father and children, they must all be regarded as if death had occurred at the same moment of time.

In *Cowman* v. *Rogers*,[39] the Court of Appeals of Maryland in a very learned opinion by Mr. Justice McSherry considered this presumption and held that there was no presumption, saying:

"In the appalling and disastrous flood which made desolate the Conemaugh Valley in the State of Pennsylvania, on May

[38] 73 Wis. 445 (1889).
[39] 73 Md. 403 (1891).

31, 1889, Walter E. Hoopes, his wife, Maria R. Hoopes, and their two children, were swept away and perished. . . . The only evidence in the record is the testimony of a single eye-witness, the sole survivor of the nine persons who were in the dwelling of Mr. Hoopes at the time the flood demolished it. From that testimony it appears that Mr. and Mrs. Hoopes, their two children, a sister of Mrs. Hoopes, Mr. Smith, the witness, his wife and two children, were occupants of a frame house in the village of Woodvale, near Johnstown; that Mr. and Mrs. Hoopes and Mr. Smith were in the parlor on the first floor on the day of the disaster, and that Smith, seeing through the windows the water rising rapidly on the outside, rushed out of the room, leaving Mr. and Mrs. Hoopes there, and made his way to the second story, where his wife and children and the children and sister of Mrs. Hoopes then were; that he hurried all of them up the stairway, carrying his infant in his arms, and when they reached the attic steps. the roof parted and fell, killing the child he was holding, breaking his own arm, and precipitating all of them into the water. Every inmate of the house, except the witness, was lost. . . . Whether Mr. and Mrs. Hoopes were drowned, or were killed by the falling of the house, and whether their children were also drowned, or were crushed by the shattered timbers of the building, no human being can tell. Whether the wife survived the husband, or the husband the wife, or whether both expired simultaneously, may be subjects for speculation and conjecture, but can never be proven or known. Whether their children survived them, or died before their parents, is shrouded in equally impenetrable uncertainty. As observed by the Lord Chancellor, in *Underwood* v. *Wing*,[40] 'We may guess, or imagine or fancy, but the law of England requires evidence.' If the parents were drowned, and the children were killed by the falling roof, it is possible the former survived their offspring for a brief but scarcely appreciable space of time. If, on the other hand, parents and children lost their lives by the crushing of the building, it is more than probable that all of them perished at once. If we were to draw inferences from the probable duration of life after a person has been submerged, those inferences would be at best only speculative, and necessarily uncertain and unsatisfactory; and in regard to the husband and wife, who, when last seen alive, were both in the parlor of their home, there is not the faintest shadow of a fact upon which to base even a conjecture as to survivorship."

The court therefore held that the insurance in the Order of the Golden Chain, the title to which was in controversy in the liti-

[40] *Supra*, note 15.

gation must be paid to her representative as she was the selected beneficiary unless the persons who affirmed that she did not survive proved the fact. The case reviews both the English and American decisions in Judge McSherry's unusually lucid style.

In *Re Willbor,*[41] three maiden sisters lost their lives in the same disaster. They had made wills by which each had designated the others as beneficiaries in the event of their surviving the testatrix. No fact or circumstance appeared from which it could be inferred that either survived the others. The court held that the question of survivorship must be regarded as unascertainable and that the rights of succession to their estates must be determined as if death had occurred to all at the same instant of time. As a result the bequest in each will to the survivors was in effect cancelled.

The doctrine of In re Willbor was adopted by the courts of Texas in the case of *Males* v. *Sovereign Camp.*[42] In that case Oliver Males and his wife with their two children lost their lives in the great storn on Galveston Island, September 8, 1900. The court said:

> "Beyond the fact that the entire family perished in the storm nothing was proven upon the trial in the court below about their deaths. No evidence was introduced and none was attainable as to which one if any of said family survived the others. There being no proof actual or attainable as to which one or ones of the family named first died, nor that their deaths were simultaneous, we appreciate the force and apparent wisdom of the civil law, which in such cases indulged presumptions based on the circumstances of age and sex which ordinarily best indicate power to prolong life in any great catastrophe, but without entering into the merits of the different rules, . . . it seems settled with us that we cannot consider the circumstances of age and sex as any evidence of priority in the death of Oliver M. Males, his wife or children."

No proof having been offered by the administrator of Helen M. Males that she survived, her estate was not allowed to participate in the fund.

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[41] 20 R. I. 126; 51 L. R. A. 863 (1897).

[42] 30 Texas Civil Appeals, 184 (1902).

In *Hildebrandt* v. *Ames*,[43] another case growing out of the Galveston flood, it appeared that the insured and his wife, the beneficiary of his insurance, were both lost in the flood. The insurance was to "Minnie Doll, wife of Frank Doll, if living, if not living to the insured's executors, administrators or assigns." The contest was between the administrator of the husband and the administrator of the wife. The facts proven were that Doll and his wife lived in the western part of the City of Galveston. About one o'clock on September 8, 1900, Doll left a grocery store in a wagon going to that part of the city saying he was going to get his wife. The horse and wagon were never seen after the storm. About four o'clock the wagon was seen coming north to the city proper. The horse was belly deep in water, but no one was seen in the wagon. The house in which the wife was, was not destroyed until 7.30 P. M. From these facts there might possibly have been drawn an inference of the wife's survivorship had the court been disposed to guess, but it refused to do so, saying:

> "This is all of the evidence in the case, and we think it is insufficient to raise the issue of the survivorship of either Frank or Minnie Doll; and until the sea gives up her dead, for aught that these facts disclose, we may not know whether one survived the other, or having in life together faced the overpowering fury of the mad waves which engulfed and destroyed the homes and lives of a great number of the inhabitants of the fated city of Galveston, they were not divided in death by the space of even a moment's time. The common law, which is at once the product and conservator of that rugged independence and sturdy self-reliance which has ever characterized the English-speaking people, disdaining to borrow from the more ancient Code of Rome, which has formed the foundation of the system of jurisprudence of many of the most enlightened nations of the world, refused to indulge in any presumption either of survivorship or of the simultaneous death of persons who perish in a common disaster, and applied to this class of cases the general rule that courts will not change the existing status or possession of property except upon adequate proof of facts authorizing such change."

In *Broom* v. *Duncan*,[44] a husband and wife went into a tim-

[43] 27 Texas Civil Appeals, 377 (1901).

[44] 29 So. Rep. 394 (Miss. 1901).

ber between 11 and 12 o'clock, the husband carrying a rifle. Shortly thereafter two shots were heard. About 6 P. M. the bodies were found, the husband squatting with the rifle across his knee and the top of his head blown off. The body of the wife was still warm, and grass and leaves were in her hands as if she had struggled when dying. Both bodies were cold by 8 P. M. Upon these facts the court held that there was sufficient evidence to show that the wife had survived her husband and that the property had descended to her.[45]

In Missouri the same question has been considered and decided in like manner in *United States Casualty Company* v. *Kacer,*[46] where the court referring to the decision *In Re Willbor,*[47] says:

> "A mass of ingenious reasoning clusters about the question, what presumption of survivorship exists when several persons perish in a common accident? The common sense of English law, after some slight attempts to adopt them, discards the intricate presumptions of the civil law, as based on age, health, sex, *etc.,* and adopts the rule that there is no presumption on the subject whatever; that he who relies on the fact of survivorship must establish it as best he can."

It will be noticed that in this case the court refers with praise to the common sense of the English law for discarding the intricate presumptions of the civil law, but the same court in the case of the *Royal Arcanum* v. *Kacer,*[48] in an opinion by Mr. Justice Goode, says:

> "The wisdom of the common law in never indulging a presumption as to which of several persons who perished in the same disaster survived longest has been unduly vaunted; for the civil law has recourse to that means of settling disputes concerning ownership of property only in instances where there is no proof, and then it becomes absolutely necessary to determine the ownership by some rule more or less arbitrary. The presumptions of those continental codes which follow the Roman law are more apt to hit the truth than others, because they are

[45] To the same effect is the case of Cooke v. Caswell, 81 Texas, 678 (1891), and Middeke v. Balder, 198 Ill. 590 (1902).

[46] 169 Mo. 301 (1902).

[47] *Supra,* note; and I Taylor's Evidence, 183.

[48] *Supra,* note 3.

based on attributes of age and sex which fix the average strength of individuals, and their ability to prolong their lives in shipwrecks or other disasters in which strength may be useful in the struggle to live. While the common law explicitly rejects all presumptions and insists on proof in every case, it implicitly accepts one; for the rule by which the right to property is ascertained in controversies growing out of such casualties, namely, that the property shall be disposed of as though all the deceased persons through whom the litigants claim died at the same instant, unless there is proof to show otherwise, has all the consequences of a presumption of simultaneous death. The logical result of discarding presumptions and exacting evidence is to put the burden of proving survivorship on any party claiming to derive title to property from a deceased person whose ownership during life depended on his outliving some other person also deceased, and the practical result is that if the party on whom the burden of proof rests cannot make proof his case falls."

From a review of these cases it will therefore be seen that the presumption of survivorship has been considered in nearly all of the important states of the United States, with the possible exception of Pennsylvania, which curiously enough has not considered it at all, and that the same general rule prevails in all and applies whether, the calamity referred to be death by murder, or in battle, fire, shipwreck or flood. In every instance where there are not to be found facts upon which a jury may with moral conviction find the fact of survivorship, the law will assume that all died at the same instant of time and distribute the estate accordingly. This was the result reached by the Supreme Court of the United States in the case of the *Young Women's Christian Home* v. *French*,[49] in which the authorities are fully reviewed.

Let me close my article as I began it, with the statement that there is no presumption of survivorship in common disaster, and each case must be decided upon its own peculiar facts and circumstances.

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[49] 187 U. S. 401 (1902).